No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEVIN GRAY, Petitioner

v.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent

On Petition for a Writ of Certiorari to the
New York State Supreme Court, Appellate Division, Third Department

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PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

Petitioner Gray was convicted in Ulster County Court upon a jury verdict finding Gray guilty of criminal possession of a weapon in the second degree (PL § 265.03[3]), upon which he received a sentence of 15 years imprisonment. The essential element of the offense was possession of an "assault weapon." The evidence at trial was that the weapon, although designed as a "semiautomatic rifle", as possessed by Gray had an irreparably broken magazine mechanism, was incapable of "semiautomatic" operation, and could be fired only by loading a single cartridge manually into the chamber. On appeal to the Appellate Division, defendant argued that, if the rifle possessed by defendant were deemed a "firearm", the conviction would violate the Second Amendment. The Appellate Division affirmed the conviction, ruling that the term "semiautomatic" refered only to "the weapon's design and capabilities", and "not the specific manner in which it was operated at a particular point in time." The Court of Appeals denied leave to further appeal the conviction.

The Question Presented is:

1. Whether the Second Amendment is violated by a state law that prohibits possession of a weapon which, though designed as a semiautomatic assault rifle, is incapable of repeating fire and is capable of operation only as an ordinary rifle?

List of Parties

All parties appear in the caption of the case on the cover page.

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Petition for a Writ of Certiorari

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

Opinions Below

1. The decision and order of the New York State Supreme Court, Appellate Division, Third Department, the highest state court to review the merits, appears at Appendix A to the petition and is reported as *People v Gray*, 151 AD3d 1470 [3d Dept 2017], 57 NYS3d 561 [2017].

2. The order of the New York State Court of Appeals dated September 28, 2017 denying leave to appeal to that Court from the above decision and order of the Appellate Division, Third Department, appears at Appendix B, and is reported at __ NY3d ___ [2017].

Jurisdiction

The date on which the New York State Court of Appeals, the state court of last resort, denied discretionary leave to appeal to that Court in petitioner's case, was September 28, 2017. A copy of that order appears at Appendix B.

No petition for rehearing of that order was filed.

The decision and order of the New York State Appellate Division, Third Department, the highest court to consider the merits, is dated June 29, 2017, and it appears at Appendix A. Notice of entry of the order of the Appellate Division was first served by the People upon counsel on June 29, 2017. Petitioner's application for leave to appeal to the New York State Court of Appeals was timely served and filed on July 24, 2017.

The jurisdiction of this Court is invoked under 28 USC §1257(a).

Constitutional and Statutory Provisions Involved

U.S. Constitution, Amendment II

> A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

U.S. Constitution, Amendment XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Penal Law § 265.03 Criminal possession of a weapon in the second degree.

A person is guilty of criminal possession of a weapon in the second degree when:

(1) with intent to use the same unlawfully against another, such person:

(a) possesses a machine-gun; or

(b) possesses a loaded **firearm**; or

(c) possesses a disguised gun; or

(2) such person possesses five or more firearms; or

(3) such person possesses any loaded firearm. Such possession shall not, except as provided in subdivision one or seven of section 265.02 of this article, constitute a violation of this subdivision if such possession takes place in such person's home or place of business.

Criminal possession of a weapon in the second degree is a class C felony.

PL § 265.00 Definitions.

3. "**Firearm**" means . . . (e) an **assault weapon**. . . .

22. "**Assault weapon**" means

(a) a **semiautomatic** rifle that has an ability to accept a detachable magazine and has at least one of the following characteristics:

(i) a folding or telescoping stock;

(ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;

(iii) a thumbhole stock;

(iv) a second handgrip or a protruding grip that can be held by the non-trigger hand;

(v) a bayonet mount;

(vi) a flash suppressor, muzzle break, muzzle compensator, or threaded barrel designed to accommodate a flash suppressor, muzzle break, or muzzle compensator;

(vii) a grenade launcher; ....

21. "**Semiautomatic**" means any **repeating rifle**, shotgun or pistol, regardless of barrel or overall length, which utilizes a portion of the energy of a firing cartridge or shell to extract the fired cartridge case or spent shell and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge or shell.

11. "**Rifle**" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

Statement of the Case

Defendant Devin Gray appealed from the February 26, 2015 judgment of Ulster County Court entered upon a jury verdict finding Gray guilty of criminal possession of a weapon in the second degree (PL § 265.03[3]) and reckless endangerment in the second degree (PL § 120.20), and a maximum sentence of a maximum determinate term of 15 years imprisonment. On appeal, in addition to State grounds, defendant raised the federal issue of the constitutionality of his conviction under the Second Amendment.

Defendant was arrested June 5, 2014 and indicted by the grand jury on June 20, 2014 in a four-count indictment (A8)[1] charging (1) criminal possession of a weapon in the second degree (PL § 265.03[3]); (2) criminal possession of a weapon in the second degree (PL § 265.03[1][b]); (3) criminal possession of a weapon in the third [as amended (A46:18-47:9)] degree (PL § 265.02[1] / 265.01[1]); and (4) reckless endangerment in the first degree (PL § 120.25).

After a jury trial, the jury on December 12, 2014 returned a verdict of guilty (A41, 284-285) with respect to two crimes – criminal possession of a weapon in the second degree (PL § 265.03[3])] and reckless endangerment in the second degree (PL 120.20) as a lesser included offense of reckless endangerment in the first degree; and it returned a verdict of not guilty with respect to all other charges submitted to it.

Both convictions arose out of an incident June 3, 2014 in the City of Kingston wherein defendant allegedly possessed and discharged a "loaded firearm" (A8), thereby allegedly creating substantial risk of serious physical injury to others.

On appeal, defendant argued the weapon as a matter of law was not an "assault weapon" unless it was proved capable of semiautomatic repeating fire, and that the evidence at trial

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[1]References "(Axx)" are to appellant's appendix on appeal to the Appellate Division.

affirmatively proved it was not.

For purposes of this case, the weapon allegedly possessed by defendant Gray was an "assault weapon" and, thus, a "firearm" (PL 265.00[3][e]) only if, at the time it was possessed, it was "a rifle that has an ability to accept a detachable magazine" (PL 265.00[22][a]); it had "a pistol grip that protrudes conspicuously beneath the action of the weapon" (PL 265.00[22][a][2]); and it was a "semiautomatic" rifle (PL 265.00[22][a]), meaning : a "repeating rifle . . . which utilizes a portion of the energy of a firing cartridge or shell to extract the fired cartridge case or spent shell and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge or shell" (PL 265.00[21]).

To be a "rifle" at all, a weapon must first be proved "operable" (*People v Longshore*, 86 NY2d 851, 852 [1995]). In this case the People, by no less than five test firings, amply proved that the weapon was "operable", in the sense that it was capable of discharging a single shell downrange (A231:19-22; 244:8-16; 245:2-21; 246:15-18; 284:11-18).

And, the evidence without dispute was sufficient to prove both that the weapon had a "protruding pistol grip" (A226:21-22; 248:14), and that it was "capable" of accepting a detachable magazine (A227:22-23; 218:12-19).

But, the evidence also established that the rifle possessed by defendant Gray on June 3, 2014 was not, in its actual operation on or after that date, a "semiautomatic" rifle within the legal definition of that term, because, *inter alia,* the weapon in its condition on June 3, 2014 and as allegedly possessed by defendant Gray was not a "repeating" rifle.

The Penal Law clearly and straightforwardly states that a rifle is not a semiautomatic "assault weapon" unless it is a "repeating" rifle (PL 265.00[22][a], 265.00[21]).

Apart from and regardless of its design or contemplated operation, this particular rifle, as

allegedly possessed by defendant on June 3, 2014 and as subsequently tested by police, was not a "repeating" rifle, because each round had to be loaded into the chamber singly and by hand.

The People's witnesses clearly testified that the "magazine" recovered with the weapon at the time it was seized was broken beyond repair and inoperable, and consequently in order to test fire the rifle on each occasion it had to be manually loaded and fired one round at a time.

The only magazine allegedly possessed by or available to defendant Gray on June 3, 2014 was the one that Detective Powers testified was collected in "four pieces" from the Fitzgerald kitchen.[2] Officer Zell testified this magazine as received by him was in "several pieces" (A229:14), and "inoperable" (A235:5), and he further testified,

> Q: Did you try to put the magazine that you found in People's Number 28, those four pieces, did you try to put that back together before you did this?
> A: No.
> Q: There was no putting that back together; is that correct?
> A: Correct.
> Q: It was kaput for good?
> A: It's inoperable.

(A234:21-235:5). Officer Zell further testified that, because the magazine was broken, the rifle, though technically "operable" (A235:16) as a rifle, had to be manually loaded and could be fired only one round at a time, stating,

> "In this case because the magazine was – was broken we inserted the round through the ejection port, one round through the ejection port. We then placed the bolt forward, and the bolt did go forward entering a round into the chamber. We pulled the trigger. The weapon went off into the ballistic vest. We then take the casing for evidence."

(A231:7-14).

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[2]Powers testified People's Exhibit #28 contained the "Hi-Point magazine in four pieces" (A207:18-19) collected from the Fitzgerald kitchen (A207:22-23), the "follower" from the kitchen counter (A208:1-5, 24-25) and several pieces "[o]n the floor" (A208:1, 209:1-2). In particular Powers testified that People's Exhibit #3, the "spring" (A217:13-16), was recovered from "the floor" (A217:17-18).

NYSP Sergeant D'Allaird (A236:6) also testified, concerning his test firings, that the magazine supplied to him with the seized weapon was inoperable, and that no compatible magazine was available to him or contained in the NYSP "reference collection" of firearms parts:

> "This particular weapon I did not have a magazine that was functional. I didn't have one. We have a reference collection where we can use different parts if we need to. I did not have a compatible magazine. "

(A242:3-7). D'Allaird also further testified, "Not having a magazine I had to actually drop a cartridge directly into the chamber" (A243:19-20). And, on cross examination D'Allaird testified,

> Q: You never test fired that weapon with a detachable clip; is that – magazine; is that correct?
> A: That is correct, sir.
> Q: And you had to manually load this weapon each time you test fired it; is that correct?
> A: That is correct, sir.
> Q: And you do that by using the ejection port, is that how you manually loaded it?
> A: By – by pulling the bolt back and, yes, by inserting it through the ejection port into the chamber of the rifle itself.

(A249:16-250:2). And,

> Q: It did not load from the detachable magazine in your presence; is that correct?
> A: I did not have a detachable magazine to load it with, sir.

(A250:15-18).

But, as shown above, without a working "magazine" containing a functioning "spring", this rifle was incapable of "repeating" fire, and accordingly it was not an "assault weapon", but merely an (admittedly operable) "rifle."

The lab evidence that the weapon was in fact not a "repeating" weapon is supported by both the forensic evidence collected at the scene and the credible evidence of eyewitnesses. All the credible evidence is that the defendant, while allegedly in possession of a loaded "repeating"

rifle, fired his weapon just one time and ran, while the other participant in the altercation, Eric Davis, fired his shotgun two times, pellets from at least one such shotgun blast striking the defendant in the abdomen.

With respect to the crime scene outside the apartments, Detective Powers testified People's Exhibit #19, 20 and 21 depict "the sidewalk area" (A204:25) and one spent nine millimeter casing (People's Exhibit # 30) recovered from that area (A204:24-205:4). Powers testified People's Exhibits # 25, 26 and 27 depict two 12-gauge shotgun shells also recovered at the scene (A206:23-25, 207:1-7). Powers was asked, and he answered, Q: "Based on your review of the scene how many casings from a nine millimeter did you recover?" A: "One spent casing" (A212:23-213:1). Q: "How many shotgun shells did you find?" A: "Two spent shotgun shells. The ones that were depicted in the photographs" (A213:18-20). Q: "And that you made the determination that the rifle had been fired once? A: At least once, yes sir. Q: You didn't find any other casings other than those – the one that was seized and depicted? A: No sir." (A214:25-215:5). Maria Rauche (A251:17) of the NYSP forensic lab, testified she compared sample cartridges test fired by her in the recovered weapon (People's Ex #32) (A255:2) to the single spent cartridge she received from Sgt D'Aillard (A256:8-10) that was "found at the scene" (A257:6), and it was her opinion that the single recovered nine millimeter cartridge had been "fired in the same rifle as my test fires" (A259:10-11).

Eyewitness testimony from witnesses present during the exchange of gunfire understandably contains discrepancies as to who fired and how many times, however all three eyewitnesses called by the People agree that no more than three shots were fired in total, consistent with the forensic evidence tending to prove that Harris fired his shotgun twice, and defendant fired his rifle once.

Eyewitness Jamelle Johnson (A129:24), a friend of Eric Harris who had known Harris "nine years" (A131:12), testified he heard exactly "three" shots (A149:12-13). According to Johnson, defendant Gray "fired the weapon" (A148:4) one time, Johnson then saw "the defendant run backwards" (A148:9, 151:15-16), he testified he "heard a second shot" (A151:16-17) but did not see who fired it, and he then heard a "third shot" that he saw fired by Eric Harris (A151:22-23). Eyewitness Deshawn White-Russell (A153:14), defendant's cousin, testified he heard only two shots, one fired by defendant Gray and one by Harris (A165:15-24). Marleine Kehoe (A167:18), girlfriend of Eric Harris (A168:18-21), alone claimed that defendant fired two times (A174:11-13, 174:21-23), testifying that she both heard (A177:2-3) and saw (A177:4-12) such shots, and that she "heard a third shot" fired by Harris (A179:20-21).

The testimony of Kehoe that defendant fired twice must be discounted. Kehoe gave an account of events immediately prior to the armed altercation that was markedly inconsistent with testimony of the other two eyewitnesses, Kehoe claiming that the defendant approached Harris' vehicle and placed the "barrel of a gun pointed through the window of the car in Eric's face" (A172:9-12), whereupon Harris "opened the door to try to push the gun away from his face" (A172:22-23). Johnson, in contrast, testified that Harris stopped his vehicle (A139:2) as defendant walked toward it, words were exchanged, defendant merely grabbed at his right shoulder (A141:1), and it was Harris who first "flung his weapon outside the window of the car" (A142:18-19). White-Russell testified he attempted to intervene in the argument outside his house by "talking to Eric Harris to calm him down" (A160:21-25), however the two men "exchanged words and then two shots rang out" (A161:20-21). Kehoe also testified inconsistently both that "[a]fter the shots rang out my back was towards them so I didn't see anything" (A176:21-22), and that it was while she was running that she heard the shots

(A176:23-24). But, Kehoe agreed with Johnson that there were a total three shots fired, testifying that she heard "[t]hree" shots total (A175:1-2), and also, "I only heard three shots that night" (A179:24). Finally, Kehoe's testimony that three shots were fired and that defendant fired twice cannot be reconciled with the uncontroverted forensic evidence yielded by an extensive police search of the area, namely that exactly three spent shells were recovered from the scene by police, two shotgun shells and only one rifle cartridge casing.

Further, while the People in their opening statement claimed the proof would show that police responding to the shooting recovered a "loaded nine millimeter rifle" (A125:21-22) from the apartment of Deshawn White-Russell and Kerrie Fitzgerald, there was no testimony at trial that the weapon as recovered by police contained a freshly chambered round, which would be the case were it functioning as a "repeating" weapon. To the contrary, Officer Solian testified that first police officer to touch the weapon in his presence was "Sergeant McKenzie from the Ulster County Sheriff's Office" (A192:10-13). Solian did not testify that McKenzie (who did not testify as a witness) "unloaded" the weapon, but merely that he "made sure it *was* unloaded and that it was safe to collect as evidence" (A192:14-18 [*emphasis added*]), which collection was done by Detective Powers (A192:19-23). The testimony of Officer Zell, the first officer to examine the weapon forensically, was that his practice before test firing any weapon of this type is first to "look through the ejection port down the barrel to make sure the barrel has no obstructions", and he testified that upon his visual inspection of this weapon as received by him, "the weapon was clear from any obstructions" (A230:22-231:1), in other words, it was empty, with no "self-chambered" round loaded.

Finally, NYSP Sgt D'Allaird testified that he inspected and examined the weapon prior to test firing it (A242:7-243:11), and he testified,

Q: What was the result of your examination prior to the test fire?
A: I deemed that the weapon did function semi automatic, was safe to fire, and functioned normally.

(A243:14-16). D'Allaird did not testify that he performed any test demonstrating either that the weapon was capable of "repeating" fire, or that its function matched the statutory definition of a "semiautomatic" weapon. He simply looked at it and "deemed" it to "function semi automatic." His opinion is entitled to no weight as proof of this essential element.

The evidence at trial thus established conclusively that the rifle allegedly possessed by defendant was neither "semiautomatic" in design nor "repeating" in actual operation. Accordingly, by definition it was neither an "assault weapon" nor a "firearm."

Reasons for Granting the Writ

The Court should grant certiorari for the following reasons:

If the Rifle Is Deemed a Firearm, The Conviction Violates the Second Amendment.

The "Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," and this "Second Amendment right is fully applicable to the States" (*Caetano v Massachusetts*, 577 U.S. ___, ___ [03/21/16]; U.S. Constitution, Amendment XIV).

In 2015 New York as well as federal courts upheld New York's newly enacted SAFE Act (L.2013 c.1 eff. 01/15/13) against constitutional challenge, precisely because of the nature of the weapons covered. New York now having construed its State law as banning weapons merely "designed" as assault weapons that do not actually function as defined, the basis for those constitutional decisions is eroded.

In *NYS Rifle and Pistol Assn. v Cuomo* (804 F.3d 242 [2d Cir. 2015] decided 10/19/15), the United States Court of Appeals for the Second Circuit held that New York has a "substantial,

indeed compelling, governmental interest[] in public safety and crime prevention", and that "the core provisions of the New York . . . laws prohibiting possession of semiautomatic assault weapons . . . do not violate the Second Amendment", because "semiautomatic assault weapons have been understood to pose unusual risks", including that "*[w]hen used*, these weapons tend to result in more numerous wounds, more serious wounds, and more victims", rendering such weapons "particularly hazardous", and because New York's law prohibiting "semiautomatic assault weapons" is "substantially related" to that "articulated governmental interest" (804 F.3d 242, 262-264 [*emphasis added*]).

In *Schulz v State of New York Exec., Andrew Cuomo, Governor* (134 AD3d 52 [3d Dept 2015] decided 10/22/15), the Appellate Division, Third Department also stated that "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention", and it held plaintiffs in that case had provided "no proof to call the well-established premise behind the challenged provisions into question, namely, that the governmental interest in public safety is substantially furthered by reducing access to weapons designed to *quickly fire significant amounts of ammunition* and the ammunition feeding devices required to hold that ammunition" (*Schulz v Cuomo,* 134 AD3d 52, 57 [*emphasis added*]).

The decisions were thus based on the premise that an "assault weapon" is "particularly hazardous" both because it is "designed to" and, "when used" does, "quickly fire significant amounts of ammunition."

The only way this rationale holds up under analysis is if an operability requirement is included, *i.e.* that the particular weapon at issue not only is "designed" to but does fire a "significant amount of ammunition quickly." Otherwise, the law discriminates among mere "rifles", without a rational basis for doing so. The rationale of the Second Circuit and the New

York State courts is sound only because the Legislature's interest is in preventing real dangers to public safety, not danger that is merely hypothetical. In other words, the SAFE Act and PL §265.03[3] are not addressed to "aesthetics."

If a rifle that cannot actually "quickly fire significant amounts of ammunition" is banned as an "assault weapon" simply because it "looks like it can" or is "designed" to do so, then PL § 265.03[3] significantly burdens ownership of mere long guns and cannot survive "intermediate scrutiny", since the law would then bear no "substantial relationship to the achievement of an important governmental objective", namely "public safety and crime prevention" (134 AD3d 52, 57). In interpreting a criminal statute, courts have the "obligation of construing it in accordance with sound constitutional principles so as to preserve its constitutionality" (*People v Epton*, 19 NY2d 496, 505 [1967]; *see, People v Finkelstein*, 9 NY2d 342, 345 [1961] [court "clearly obliged by statute and decisional law to embrace [interpretation] that which will preserve [statute's] validity"]). However, the Appellate Division in this case failed to interpret PL § 265.03[3] criminalizing possession of a loaded "assault rifle" to include as an element that the alleged "semiautomatic" weapon be proven to have been actually functioning and operable as a "repeating" rifle (PL §§ 265.00 [21], [22][a]).

Appellant's Second Amendment argument is that, in the wake of recent cases such as *Caetano v Massachusetts*, (577 U.S. ___ [2016]), New York's criminalization of "assault rifle" possession remains sustainable, if at all, only if the ban is limited to weapons that actually function as an "assault rifle", *i.e.*, a "semiautomatic", "repeating" rifle which, "when used", is provably capable of "quickly firing significant amounts of ammunition" (see *Schulz v Cuomo,* 134 AD3d 52, 57 [3d Dept 2015]; *NYS Rifle and Pistol Assn. v Cuomo* (804 F.3d 242 [2d Cir. 2015]). In order to "preserve its constitutionality" (*People v Epton*, 19 NY2d 496, 505 [1967];

see, People v Finkelstein, 9 NY2d 342, 345 [1961] the New York courts were required to construe PL § 265.03[3] to require, as an element, that the alleged "semiautomatic" weapon be proven to have been, at the time of defendant's possession, actually functioning and operable as a "repeating" rifle (PL §§ 265.00 [21], [22][a]). The interpretation given New York statutes by the New York courts in this case impermissibly burdens the ownership and possession of weapons that are protected under the Second Amendment, and the judgment should be reversed.

Conclusion

The petition for a writ of certiorari should be granted.

Dated : December 21, 2017

Respectfully submitted,
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